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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CAPTAIN D'S, LLC
Petitioner,

v.

TAMMY SMITH, by and through her father and next friend, ALVIN CHRISTOPHER SMITH,
Respondent.

On Petition for a Writ of Certiorari to the Mississippi Supreme Court

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Mississippi Supreme Court erred when, after finding that a valid and enforceable agreement to arbitrate existed between the parties, it held that as a matter of law certain common law tort claims arising out of an alleged sexual assault incident on a minor in the workplace are unsuitable for arbitration under the Federal Arbitration Act ("FAA").

2. Where a party's federal rights under the FAA turn on an antecedent application of state-law to the arbitration clause itself, which is interwoven with federal substantive law, whether a state court can nullify a party's right to arbitration by manipulating state-law principles in order to single out particular types of grievances as being unsuitable for arbitration.

3. Whether the Fourteenth Amendment's procedural protections extend to preclude a deprivation of rights afforded under the FAA without due process being afforded.

RULE 14.1(b) STATEMENT

The following were parties to the proceedings before the Mississippi Supreme Court:

1. Captain D's, LLC; Defendant-Appellee; Petitioner on Review.
2. Tammy Smith (by and through her father and next friend, Alvin Christopher Smith); Plaintiff-Appellant; Respondent on Review.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

There is no parent corporation or publicly held corporation owning 10% or more of the stock of Captain D's, LLC, Petitioner herein.

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PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

It is firmly-settled that the FAA, enacted pursuant to the Commerce Clause, is substantive federal law enforceable in state courts and applicable to state common law causes of action. *Southland Corp. v. Keating*, 465 U.S. 1, 11-12, 104 S. Ct. 852, 858-859, 79 L. Ed. 2d 1 (1984). Though the enforcement of the federal rights granted under the FAA may, in appropriate circumstances, involve state-law principles of contract interpretation, protecting and preserving these federal rights relies on an interwoven and overarching application of federal substantive law to ensure that the state-law principles are not

manipulated to disguise the singling out of arbitration for suspect status, thus nullifying the FAA. See *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983) (cited in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford, Jr. University*, 489 U.S. 468, 475, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989)). Indeed, it is this Court which must provide protection against "a state court's construction of a contract in such a way as to preclude enforcement of a federal right." *Volt*, 489 U.S. at 482 (Brennan, J., dissenting).

These principles play leading roles in this petition as the Mississippi Supreme Court refused to give "equal-footing" status to the parties' valid agreement to arbitrate and, in so doing, created a substantive rule of law which stands in conflict with decisions of this Court and which now must be followed by the U.S. Court of Appeals for the 5th Circuit in diversity cases; namely, that common law tort claims are non-arbitrable where they arise out of a sexual assault incident in the workplace, notwithstanding the plain and unambiguous language of the arbitration agreement.

OPINIONS BELOW

The Mississippi Supreme Court's decision is reported at 963 So. 2d 1116, 100 Fair Empl. Prac. Cas. (BNA) 1745, 154 Lab. Cas. P. 60,433, 26 IER Cases 385. App., *infra*, 1a-17a. The Mississippi Supreme Court handed down its original decision on June 14, 2007, and denied rehearing on September 13, 2007. App., *infra*, 25a. The judgment of this state court of last resort operated to reverse the December 13, 2005, decision of the Circuit Court of Alcorn County, Mississippi. App., *infra*, 18a-24a.

BASIS FOR JURISDICTION

This petition comports with the conditions prescribed by the governing statute for the Court's acceptance of jurisdiction over an appeal; namely, that the appeal be taken from a "[f]inal judgment . . . of the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). The jurisdiction of the United States Supreme Court is invoked in a timely and proper manner. The order of the state supreme court denying Petitioner's motion for rehearing was entered on September 13, 2007, and this petition is being submitted within the ninety (90) day time period allowed by the statute for the taking of an appeal to this Court. 28 U.S.C. § 2101(c).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional and statutory provisions involved in this case are the Supremacy Clause of the United States Constitution; the Fourteenth Amendment to the United States Constitution; and § 2 of the Federal Arbitration Act ("FAA") which provide, respectively:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., art. VI, cl. 2 (App., *infra*, 26a);

> No State shall . . . deprive any person of life, liberty, or property, without due process of law;

> nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV, § 1 (App., *infra*, 27a); and

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. App., *infra*, 28a.

STATEMENT OF THE CASE

The genesis of this appeal is the Mississippi Supreme Court's ad hoc singling out of certain claims as being unsuitable for arbitration by refusing to enforce the plain and unambiguous terms of a valid arbitration agreement entered into by and between employer and employee, where the employee's common law tort claims against employer stemmed from an alleged sexual assault by the employer's manager. The decision of the state court does violence to the Constitution of the United States of America and to the FAA.

A. Factual Background

Petitioner Captain D's, LLC, owns and operates several hundred seafood restaurants across the United States as well as in several countries. Throughout its restaurants, Captain D's and its employees universally enter into a stand-alone arbitration agreement,

conspicuously titled "EMPLOYEE DISPUTE RESOLUTION PLAN."

On February 3, 2004, Respondent, Tammy Smith, was a 17-year-old applicant for a job at a Captain D's restaurant in Corinth, Mississippi. In connection with securing employment there, Smith executed the stand-alone arbitration agreement, which provided in relevant part:

> [B]oth Captain D's and I agree to settle ***any and all previously unasserted claims, disputes, or controversies arising out of or relating to my application for employment, employment and/or cessation of employment with Captain D's, exclusively by final and binding arbitration before a neutral arbitrator***. By way of example only, such claims include claims under federal, state and local statutory or common law, such as the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, including the amendments of the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Medical Leave Act, the law of contract and ***law of tort***.

App., *infra*, 29a-31a (emphasis added). Smith's Grandmother, Pat Spencer, also executed the Arbitration Agreement as Smith's guardian. *Id.*

B. Proceedings Below

Unmoved by the covenant formed by the arbitration agreement, on August 17, 2004, Smith filed suit against Captain D's and her supervising manager Christopher Lee Howell in the Circuit Court of Alcorn County, Mississippi. The significant allegations of Smith's lawsuit accused Howell of sexually assaulting and raping her while on the restaurant premises, while she was working and while she was

under his supervision as her manager. Separately, Smith's lawsuit charged Captain D's with common law tort claims of negligent hiring, negligent supervision and negligent retention of Howell, seeking a judgment of compensatory and punitive damages from Captain D's on these claims.

In the state trial court, Captain D's promptly filed a notice of election of binding arbitration and moved to compel Smith's claims against it to arbitration consistent with the mandates of the FAA which subjected Smith's claims to that forum. Separate Defendant Howell, proceeding *pro se*, answered the lawsuit in the trial court but did not join in Captain D's motion or otherwise seek arbitration of the separate claims against him.

Smith resisted arbitration by claiming, foremost, that she was not bound to the agreement due to her status as a minor and, secondarily, that the costs of arbitration were prohibitive, rendering the agreement unconscionable. Smith raised no challenge to the scope of the arbitration clause.

In December of 2005, the Mississippi trial court[1] granted Captain D's motion to compel arbitration and directed the parties to arbitrate those claims which Smith leveled at Captain D's. The trial court—which had received briefing, evidence and argument on the issues presented—found that it was "apparent [Smith's] real contention is that [she], due to her minority status, should not be bound by the arbitration agreement." App., *infra*, 19a. The trial court rejected this defense, reasoning that Congress's dec-

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[1] At that time, the trial court was presided over by the Honorable Sharion R. Aycock. Judge Aycock is now a United States District Judge in the Northern District of Mississippi.

laration of a national policy favoring arbitration, together with ordinary principles at law or in equity for the revocation of any contract, commanded a finding of arbitrability. *Id.* at 19a and 23a.

Smith perfected an appeal from the trial court's decision to the Mississippi Supreme Court. Smith's "rape claim" against Howell was not part of the trial court's ruling and neither Howell nor Smith's claims against him were joined in her appeal. On appeal, Smith attacked the validity of her arbitration agreement on three limited grounds: 1) her minority status permitted her to disavow the arbitration agreement; 2) the arbitration agreement was unconscionable; and 3) Captain D's had waived its right to arbitration.[2] Again, Smith raised no challenge to the scope of the arbitration clause.

The Mississippi Supreme Court, in a divided ruling, reversed the trial court's decision compelling arbitration and directed that Smith's claims against Captain D's would be tried in a court of law. App., *infra*, 1a-17a. Significantly, the majority of the court readily determined a valid, binding arbitration agreement did in fact exist between the parties. Not ending its analysis with the issues raised by the party resisting arbitration, however—and taking an unprecedented measure—the court presumed to consider, *sua sponte,* whether Smith's claims were within the scope of the arbitration agreement, despite the critical fact that Smith *never* raised such a defense to arbitration and, accordingly, the trial court had never considered or passed upon such a defense—much less had Captain D's been afforded

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[2] Smith raised the defense of waiver for the first time on appeal.

the right to meet and rebut the defense. See *Leverett v. State*, 197 So. 2d 889, 890 (Miss. 1967) (holding, "[t]he [Mississippi] Supreme Court is a court of appeals, it has no original jurisdiction; it can only try questions that have been tried and passed upon by the court from which the appeal is taken. Whatever remedy appellant has is in the trial court, not in this court. This court can only pass on the question after the trial court has done so.") (quoting *Collins v. State*, 159 So. 865 (1935)).

Even so, the Mississippi Supreme Court correctly found that the language of the arbitration agreement—namely, the language: "any and all previously unasserted claims, disputes, or controversies arising out of or relating to my . . . employment"—made it a broad arbitration provision under federal substantive law (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967)), "capable of expansive reach." Still, the majority summarily concluded from there that "[w]hile recognizing the breadth of the language in the arbitration provision, we unquestionably find that a claim of sexual assault neither pertains to nor has as connection with [Smith's] employment."

Recognizing the violence done to Captain D's rights by the majority, Justice Dickinson, in dissent, observed:

> The majority and I are in agreement that Tammy Smith and Captain D's entered a valid, binding arbitration agreement. There were no other issues raised by the parties and briefed to the trial court or to this Court on appeal. Thus, the majority today takes the unusual step of deciding an . . . appeal on an issue never raised or briefed by either party, and not discussed by the trial court.

The Mississippi Supreme Court was never called upon, Justice Dickinson pointed out, to decide the issue *vel non* of whether a "rape claim" arises out of or relates to employment, and noted that "in its zeal to separate what it calls "[Smith's] rape claim" from the scope of her arbitration agreement, the majority fails to absorb the fact that [Smith] filed no rape claim against Captain D's." Smith's claims against Captain D's sounded in common law tort theories of "negligent hiring, negligent supervision, and negligent retention." *A fortiori*, Justice Dickinson quipped that "[i]t could be argued that [Smith's] claims against Captain D's so clearly related to her employment that [Smith's] counsel didn't even bother raising the issue with the trial court or here. One would think that if [Smith's] counsel concluded the argument had any merit whatsoever, it would have at least been raised and argued." Justice Dickinson concluded, "[b]ecause the majority decides this appeal on an issue never raised; ignores the need for a factual determination; and simply decides *as a matter of law* that [Smith's] claims do not relate to her employment, I respectfully dissent." App., *infra*, 12a-17a (emphasis added).

Captain D's moved for rehearing by the Mississippi Supreme Court. On rehearing, Captain D's asserted: 1) the court arbitrarily singled out Smith's claims as being suspect for the arbitration process by judicially creating an ad hoc exception to ordinary rules of state-law which denied Captain D's its federal rights under the FAA; 2) the court, in conflict with decisions of this Court, eschewed applicable federal substantive laws of arbitrability in declaring that, notwithstanding the unambiguous language of the arbitration agreement, certain types of claims, in its judgment, were simply unsuitable for arbitration; and 3) the court decided an important federal ques-

tion in a way that conflicted with the decision of other state and federal courts, including at least one state court of last resort. App., *infra*, 32a-52a.

Captain D's motion for rehearing was denied on September 13, 2007, without a written opinion. Petition for writ of *certiorari* now follows.

REASONS FOR GRANTING THIS PETITION FOR WRIT

The Mississippi Supreme Court, in conflict with decisions of this Court and at least one state court of final resort, violated the *Moses H. Cone* principle by singling out certain types of grievances as being unsuitable for arbitration, without regard for federal policy to the contrary, thereby displaying suspicion for that forum and deepening the uncertainty in the 5th Circuit Court of Appeals as to the extent to which state-law must be followed where it has been manipulated or used as a pretense to deny a party's federal rights to arbitration.

Further, the instant ruling is the most recent in a developing line of cases in which the Mississippi Supreme Court has substituted its judgment for that of Congress in passing the FAA by declaring certain types of claims as being unsuitable for arbitration, displaying suspicion for arbitration as being an appropriate forum for dispute resolution.

Finally, the Mississippi Supreme Court violated Captain D's Fourteenth Amendment guarantees of due process.

There exists no controversy to the fact that the FAA governs this case and would mandate arbitration of the parties' dispute if its application had not been thwarted by the Mississippi Supreme

Court's creation of a rule of law that common law tort claims arising out of an alleged sexual assault incident involving a minor in the workplace are not suitable for arbitration. As a threshold matter, it is respectfully submitted that the *Moses H. Cone* principle of due regard being given "to the federal policy favoring arbitration and that ambiguities as to the scope of the arbitration clause itself are to be resolved in favor of arbitration" makes this Court's review plain, notwithstanding that the decision at issue ostensibly turned on judicial construction of an arbitration agreement. See *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford, Jr. University*, 489 U.S. 468, 475-476, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989) (citing *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)). In contrast to this Court's resolution in *Volt* that it would not revisit a lower court's judicial interpretation of a choice-of-law provision in an arbitration agreement as "[t]here is no federal policy favoring arbitration under a certain set of rules," the case *sub judice* involves the arbitration clause itself and thus unquestionably invokes the clearly-favored *federal* policy of ensuring "the enforceability, according to their terms, of private agreements to arbitrate." *Id.* at 476.

Captain D's concedes, as it must, that the interpretation of private agreements is generally regarded as being within the domain of state-law. Overarching that general proposition, however, is the *federal* directive that courts—indeed, state courts—in determining whether parties agreed to arbitrate a dispute, must apply the "federal substantive law of arbitrability." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S. Ct.

3346, 87 L. Ed. 2d 444 (1985) (citing *Moses H. Cone Mem. Hosp.*, 460 U.S. at 24, 103 S. Ct., at 941; *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 400-404, 87 S. Ct. 1801, 1804-1806, 18 L. Ed. 2d 1270 (1967); *Southland Corp. v. Keating*, 465 U.S. 1, 12, 104 S. Ct. 852, 859, 79 L. Ed. 2d 1 (1984)). The "equal-footing" guaranty of § 2 of the FAA—namely, that arbitration agreements be treated like all other contracts—is, above all, a federal substantive command. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006).

As the case below represents, where "the existence or the application of a federal right turns on a logically antecedent finding on a matter of state law," (*Volt*, 489 U.S. at 484 (Brennan, J., dissenting)), it enables a so-inclined court to mask disfavor for arbitration under the guise of "state-law." Where that occurs, higher scrutiny cannot be escaped. A state court's emasculation of federal rights commands ancillary review "in order that the constitutional mandate may not become a dead letter." *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100, 58 S. Ct. 443, 82 L. Ed. 685 (1938); see also *Phelps v. Board of Education of West New York*, 300 U.S. 319, 322-323, 57 S. Ct. 483, 484-485, 81 L. Ed. 674 (1937); *Irving Trust Co. v. Day*, 314 U.S. 556, 561, 62 So. 2d 398, 401, 86 L. Ed. 452 (1942).

It is this dance between principles of federal substantive law and those of state-law in the arbitration context which has created uncertainty in the U.S. Court of Appeals for the 5th Circuit (the federal circuit for Mississippi), which cries out to be settled. See *Washington Mut. Fin. Group, LLC v. Bailey*, 364 F.3d 260 (5th Cir. 2004) (Miss.). In

Bailey, Judge Jolly, writing for the 5th Circuit, noted that "[i]n determining whether a party should be compelled to arbitrate its claims against another, we acknowledge that whether a court should apply state law or 'the federal law of arbitrability,' (citation omitted), is often an uncertain question." *Bailey*, 364 F.3d at 267 n.6.

The call to quiet the uncertainty within the equation is underscored by the Mississippi Supreme Court effectively creating a state rule of law which singles out certain grievances as being unsuitable for arbitration—despite the validity of the agreement to arbitrate—which the 5th Circuit, sitting in diversity, will now be required to follow under the *Erie* doctrine. See *Bailey*, 364 F.3d at 264 (holding, "in determining whether the parties agreed to arbitrate a certain matter, courts apply the contract law of the particular state that governs the agreement . . . [meaning] Mississippi law applies here."); *Buchman v. BASF Corp.*, 107 Fed. Appx. 378 (5th Cir. 2004) (Miss.) (holding, Mississippi substantive law applies to breach of contract dispute where court is sitting in diversity); *Centennial Ins. Co. v. Ryder Truck Rental, Inc.*, 149 F.3d 378, 382 (5th Cir. 1998) (Miss.) (holding, in diversity case involving interpretation of contract, "we start [our resolution of the case] by determining whether or not any final decisions of the Mississippi Supreme Court are dispositive."). Superimposed, however, on the 5th Circuit's *Erie* obligations are the intertwined considerations of federal substantive law for which the federal court is also required to account. See *Bank One, N.A. v. Shumake*, 281 F.3d 507, 513 (5th Cir. 2002) ("the FAA reflects a strong policy favoring the enforcement of arbitration clauses"); *Grigson v. Creative Artists Agency*, 210 F.3d 524, 526 (5th Cir. 2000) ("Arbi-

tration is favored in the law.") (citing *Moses H. Cone Memorial Hospital v. Mercury Construction*, 460 U.S. 1, 24-25, 103 S. Ct. at 942, 74 L. Ed. 2d 765 (1983)). Conflict and uncertainty are thus deepened where unchecked state-law says one thing, but federal substantive law would compel a different.

It has been established, for example, that it is a rule of *federal* substantive law which places the burden of proving certain claims are unsuitable for arbitration squarely on the shoulders of the party resisting arbitration. *Gilmer v. Interstate/Johnson Lane Corp*, 500 U.S. 20, 26, 111 S. Ct. 1647, 114 L.Ed.2d 26 (1991); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 227, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987); see also *Green Tree Financial Corp.-Alabama, supra*, 531 U.S. at 92, 121 S. Ct. at 522 ("We have held that the party seeking to avoid arbitration bears the burden of establishing that Congress intended to preclude arbitration of the statutory claims at issue."). The Mississippi Supreme Court relieved Smith altogether of this burden as she never claimed (much less proved) that her claims were not contemplated for arbitration by the terms of the agreement.

It is also a rule of *federal* substantive law—universally applied—that courts may not invalidate arbitration agreements under state laws applicable only to arbitration provisions. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006); 9 U.S.C. §2. A necessary extension of this *federal* substantive rule is the preemption of discriminatory or pretextual application of ordinary principles of state-law to the interpretation of arbitration agreements. This Court has consistently "rejected generalized attacks on

arbitration that rest on 'suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants.'" *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 90, 121 S. Ct. 513, 521, 148 L. Ed. 2d 373 (citing *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481, 109 S. Ct. 1917, 104 L. Ed. 526 (1989); *Prima Paint*, 388 U.S. at 404; *Southland Corp. v. Keating*, 465 U.S. at 16-17, n. 11, 104 S. Ct. at 862, n. 11.

As Justice Brennan noted in his dissent in *Volt*, "in order to guard against arbitrary denials of federal claims, a state court's construction of a contract in such a way as to preclude enforcement of a federal right is not immune from review in this Court as to its 'adequacy.'" *Volt*, 489 U.S. at 468, 482 (Brennan, J., dissenting). This is consistent with the holding in *Perry v. Thomas*, wherein this Court observed "[a] court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law. Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to affect what we hold today the state legislature cannot." *Perry v. Thomas*, 482 U.S. 483, 492, n. 9, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987).

The instant case therefore calls for review to preclude ad hoc applications of state-law rules from being used as an artificial aegis to scrutiny and to ensure that federal rights are not "nullified by the manipulation of state law." *Volt*, 489 U.S. at 484 (citing Wechsler, *The Appellate Jurisdiction of the*

Supreme Court: Reflections on the Law and the Logistics of Direct Review, 34 Wash. & Lee L. Rev. 1043, 1052 (1977)). The *Moses H. Cone* principle should be applied to resolve this matter; for that principle limits state-law by paying full homage to the fact that arbitration is strictly a matter of private contract, the interpretation of which is ordinarily a question of state-law, while insisting that state-law is not manipulated to denude a party of its federal rights to arbitration. *Moses H. Cone*, 460 U.S. at 24. In other words, the analysis *cannot* begin and end with state-law. The Supremacy Clause reserves no room for state rule of law to remain wholly unchecked. U.S. Const., art. VI, cl. 2. Indeed, "[t]he FAA requires that a court determining a question of arbitrability ***not stop*** at the application of state-law rules for construing the parties' intentions, but that it also take account of the command of federal law that 'those intentions [be] generously construed as to the issues of arbitrability.'" *Volt*, 489 U.S. at 468, 487 (Brennan, J., dissenting) (quoting *Mitsubishi Motors, supra*, 473 U.S. at 626, 105 S. Ct. at 3354) (emphasis added).

In the case below, Smith, the party resisting arbitration, made narrow and limited challenges to the validity of the agreement to arbitrate. The Mississippi Supreme Court in fact found, favorably to Captain D's, that Smith entered into a valid, binding arbitration agreement—thereby rejecting her claim that the contract could be invalidated. At this point, the Mississippi Supreme Court was required to rigorously enforce the agreement. See *Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. 213, 221, 105 S. Ct. 1238, 1242, 84 L. Ed. 2d 158 (1985). Instead, the court presumed to undertake consideration of whether Smith's common law tort claims were out-

side the scope of the arbitration agreement, notwithstanding that 1) Smith never challenged the scope of the arbitration agreement;[3] and 2) Smith had implicitly taken the position at the trial court level that her claims against Captain D's were within the scope of the arbitration agreement.[4] To get there, the Mississippi Supreme Court jettisoned *stare decisis* and took the unprecedented step of refusing to enforce ordinary state-law principles, granting Smith dispensation which weakened—indeed, eviscerated—the protections afforded to Captain D's under §2 of the FAA. Demonstrating judicial disfavor (or, perhaps, distrust) toward the arbitration process for Smith's claims in this case, the Mississippi Supreme Court created a principle of state-law which flowed directly from the fact that a contract to arbitrate was at issue. It cannot escape observation, either, that the underlying incident from which Smith's claims were taken involved a shocking allegation of rape of a

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[3] The corollary to this was that Captain D's was never afforded the fundamental opportunity to meet, defend and rebut such a challenge.

[4] At the trial court level, Smith had argued that "but for the intentional tort exclusion, this case would fall under the [Mississippi] Workers' Compensation Act." For a claim to "fall under the [Mississippi] Workers' Compensation Act" it must "arise out of and in the course of employment." Miss. Code. Ann. § 71-3-7. Much more, then, than simply *not* contesting that her claims fell outside the scope of the arbitration agreement, Smith actually conceded the point that her claims "arose out of" her employment—a position totally consistent with not challenging the scope of the agreement. As the subject arbitration agreement unambiguously covered all "claims, disputes, or controversies ***arising out of or relating to [Smith's] . . . employment . . . with Captain's D's***," there was never a case or controversy concerning the scope of the agreement. App., *infra*, 36a-37a.

minor. That notwithstanding, "a motion to compel arbitration should not be denied 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" *United Steel Workers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960).

When Justice Dickinson outed the majority for taking "the unusual step of deciding an . . . appeal on an issue never raised," what he was observing was the over-reaching but calculated desire of the majority to "separate . . . [Smith's] rape claim from the scope of the arbitration agreement." This singular observation reveals the arbitrary reluctance of the majority to submit Smith's claims to arbitration and belies any assertion that the Mississippi Supreme Court's decision rested on a non-federal and independent state ground. See *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157, 164, 37 S. Ct. 318, 61 L.Ed. 644 (1917).

Prior to taking on the arbitrability of Smith's claims, no other state rule of law had been applied more consistently or rigorously by the Mississippi Supreme Court than the rule that an issue not raised before the lower court and only raised for the first time on appeal is deemed waived and procedurally barred. See, *e.g.*,, *Waters v. Gnemi*, 907 So. 2d 307, ¶ 39 (Miss. 2005) (holding, "[w]e have been consistent in holding that we need not consider matters raised for the first time on appeal, which practice would have the practical effect of depriving the trial court of the opportunity to first rule on the issue, so that we can then review such trial court ruling under the appropriate standard of review); *Cooper v. Lawson*, 264 So. 2d 890, 890 (Miss. 1972) (applying procedural

bar, refusing to consider matters not raised by appellant); *Leverett v. State*, 197 So. 2d 889, 890 (Miss. 1967) (holding, "[t]he Supreme Court is a court of appeals, it has no original jurisdiction; it can only try questions that have been tried and passed upon by the court from which the appeal is taken. Whatever remedy appellant has is in the trial court, not in this court. This court can only pass on the question after the trial court has done so.") (quoting *Collins v. State*, 159 So. 865 (1935)).

In other contract cases reviewed by the Mississippi Supreme Court, it has without fail refused to entertain defenses which were not asserted at the trial court level. See, *e.g.*, *Braidfoot v. William Carey College*, 793 So. 2d 642, ¶ 47, 144 Lab. Cas. P 59,343, 157 Ed., Law Rep. 432 (Miss. App. 2001) (holding "it is a rule of almost universal application that ***questions of whatever nature*** not raised in the trial court and preserved for review will not be noticed on appeal); *Anglin v. Gulf Guaranty*, 956 So. 2d 853, ¶ 26 (Miss. 2007) (the Mississippi Supreme Court refused to consider a defense to a contract of insurance which was raised for the first time on appeal, proclaiming, [t]his Court has been consistent in holding that we need not consider matters raised for the first time on appeal.").

The Mississippi Supreme Court has heretofore even applied the procedural bar when reviewing grants or denials of arbitration. See, *e.g.*, *Gulf Ins. Co. v. Neel-Schaffer*, 904 So. 2d 1036, ¶ 32 (Miss. 2004) (firmly stating that defense to arbitration on grounds of substantive unconscionability was barred based on fact that it was raised for first time during appeal); *Speedee Cash of Mississippi, Inc. v. Williams*, 915 So. 2d 1061, ¶ 6 and ¶ 7 (Miss. 2005) (holding, in review

of party's defense to arbitration on grounds of unconscionability, "there is absolutely nothing in the record to show that this claim was raised before the [trial] court . . . [t]herefore, we must treat the issue of unconscionability as one never presented to the circuit court and apply the procedural bar.").

Thus, the conclusion flowing from the case at hand is that this is not so much a case of categorical hostility toward the arbitration process as it is a case of disfavor for arbitrating certain types of claims, which is equally offensive to the FAA. By refusing to apply the procedural bar "on an issue never raised" by Smith, the Mississippi Supreme Court displayed a peculiar bias against arbitration of *certain* types of claims, substituting its judgment for the parties' consent to arbitration. See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57-58, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995) (FAA assures that parties' agreements to arbitrate will be enforced according to their terms ***"even if a rule of state law would otherwise exclude such claims from arbitration"*** (emphasis added)).

This case is not the first in which the Mississippi Supreme Court has determined that certain claims are, in its judgment, not suitable for arbitration. See *Rogers-Dabbs Chevrolet-Hummer, Inc. v. Blakeney*, 950 So. 2d 170 (Miss. 2007). There, the state supreme court, despite the plain language of the agreement, denied arbitration of *certain* types of claims by resolving that "no reasonable person" would have agreed to submit claims to arbitration where the underlying incident involved a fraudulent scheme. *Rogers-Dabbs*, 950 So. 2d at 177. One can only conclude from the *Rogers-Dabbs* case and the instant case that the more alarming the underlying

incident at issue is, the less suitable the case is for arbitration in the judgment of the Mississippi Supreme Court. This is a perilous precedent if left unchecked and a prelude to what is to come of arbitration in this state. The inclination and opportunity to judicially legislate what types of claims should and should not be arbitrated, without regard to ordinary state-law principles of contract interpretation, represents a clear and present danger that arbitration in Mississippi will not be given "equal-footing" with other private agreements.

In addition to removing the procedural bar and relieving Smith of her federally mandated burden of proving a defense (raised for her by the court) to arbitration, the Mississippi Supreme Court disregarded federal substantive law relative to the scope of the arbitration agreement at issue. Where parties have entered into an agreement to arbitrate, the court must afford a presumption of arbitrability and "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.'" *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 650, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986). This presumption has been said to be "particularly applicable" where the arbitration clause is found to be broad—just as the Mississippi Supreme Court found the clause to be in the instant matter. In such cases, "[i]n the absence of any ***express provision excluding a particular grievance*** from arbitration, . . . only the ***most forceful evidence*** of a purpose to exclude the claim from arbitration can prevail." *Id.* (citing *Warrior & Gulf Navigation Co., supra,*

363 U.S. at 584-85 (emphasis added). As Justice Dickinson aptly pointed out in regard to the majority's exclusion of Smith's grievances from arbitration, "[t]his Court, of course, never examined the facts because we . . . were given no facts to examine."

Nor did the Mississippi Supreme Court's decision include any of the ordinary state-law tenets of contract construction in excluding Smith's claims from arbitration. Under Mississippi law, when interpreting any contract—regardless of whether it contains an arbitration clause—the court must "accept the plain meaning of [it] as the intent of the parties where no ambiguity exists." *Ferrara v. Walters*, 919 So. 2d 876, 882 (Miss. 2005). It has further been written that the court is not to be concerned with what the parties may have intended, "but with what they said, since the words employed are by far the best resource for ascertaining the intent and assigning meaning with fairness and accuracy." *Royer Homes of Miss., Inc. v. Chandeleur Homes, Inc.*, 857 So. 2d 748, 752 (Miss.2003) (also holding that "[t]he reviewing court is not at liberty to infer intent contrary to that emanating from the text at issue."); see also, *Miss. Farm Bureau Mut. Ins. Co. v. Walters*, 908 So. 2d 765, 769 (Miss. 2005); *State Auto. Mut. Ins. Co. v. Glover*, 253 Miss. 477, 176 So. 2d 256, 258 (1965)). By declining to appraise Captain D's FAA rights with general state-law principles and in a manner which also honored the federal policy favoring arbitration, the decision of the Mississippi Supreme Court stands in conflict with every U.S. Circuit Court of Appeals. See, *e.g., PaineWebber Inc. v. Elahi*, 87 F.3d 589 (1st Cir. 1996); *Chelsea Square Textiles, Inc. v. Bombay Dyeing and Mfg. Co., Ltd.*, 189 F.3d 289 (2nd Cir. 1999); *Medtronic Ave, Inc. v. Advanced Cardiovascular Systems, Inc.*, 247 F.3d 44 (3rd Cir. 2001);

Gregory v. Interstate/Johnson Lane Corp., 188 F.3d 501 (4th Cir. 1999); *Bank One, N.A. v. Shumake*, 281 F.3d 507 (5th Cir. 2002); *Salary Policy Employee Panel v. Tennessee Valley Auth.*, 731 F.2d 325 (6th Cir. 1984); *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126 (7th Cir. 1997); *Stark v. Sandberg, Phoenix & von Gontard, P.C.*, 381 F.3d 793 (8th Cir. 2004); *Bradley v. Harris Research, Inc.*, 275 F.3d 884 (9th Cir. 2001); *Cogswell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 78 F.3d 474 (10th Cir. 1996); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359 (11th Cir. 2005); *Ekstrom v. Value Health, Inc.*, 68 F.3d 1391 (D.C. Cir. 1995); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366 (Fed. Cir. 2006).

The Mississippi Supreme Court, instead, "skillfully and smoothly" resolved that "the question of 'scope' is narrowed to whether [Smith's] ***rape claim*** arises out of or relates to '[Smith's] application for employment with Captain D's,' so as to subject [her] ***sexual assault claim*** to arbitration," ruling that it did not. This holding represented an inappropriate co-mingling of Smith's claims against Captain D's with her claims of sexual assault, which were stated independently against Captain D's manager, Christopher Howell. In addition to the deepening tension this ruling (together with the ruling in *Rogers-Dabbs, supra*) will create within the 5th Circuit when it is called upon to follow Mississippi law, the Mississippi Supreme Court's refusal to distinguish the common law tort claims flowing between the parties to the arbitration agreement (Smith and Captain D's) from the independent claims of rape and sexual assault flowing between non-parties to the agreement (Smith and Howell), stands in conflict with the Alabama Supreme Court's decision in *Ryan's Family Steak Houses, Inc. v. Regelin*, 735 So. 2d 454 (Ala. 1999).

There, the parties—a restaurant-employer and six (6) of its employees—had agreed in writing to resolve any "employment-related disputes" by arbitration. *Regelin*, 735 So. 2d at 455. Subsequently, the employees sued their employer for, *inter alia*, negligent training and supervision. *Id.* These claims arose out of sexually inappropriate conduct which occurred in the workplace. *Id.* The restaurant-employer moved to compel arbitration and the plaintiffs resisted it. *Id.* at 456-57. The Alabama Supreme Court properly reviewed the arbitrability issue under 9 U.S.C. §2 and federal substantive law applicable thereto, finding that the employees had agreed to submit all "employment-related disputes"[5] to arbitration and thus the claims were directed to arbitration. *Id.* 457. Accordingly, in Alabama, where Captain D's has restaurants, Smith's claims would be arbitrable under the FAA, but not in Mississippi. The conflicting results in the different states cannot be attributed to differing principles of state-law. It can only be said that the conflict arises directly from a state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue. This does not comport with the requirement of § 2 of the FAA. See *Prima Paint*, 388 U.S. at 404, 87 S. Ct. at 1806; *Southland Corp. v. Keating*, 465 U.S. at 16-17, n. 11, 104 S. Ct. at 862, n. 11.

The FAA was specifically enacted "to overrule the judiciary's long-standing refusal to enforce agreements to arbitrate," (citation omitted) and to place such agreements "upon the same footing as other contracts" (citation omitted). *Volt*, *supra*, 489 U.S.

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[5] This is substantially similar language to the Captain D's-Smith arbitration agreement, *i.e.*, "arising out of or relating to . . . employment."

468 at 478. With a proper application of federal law in this case, the state court's judgment would have been different.

Finally, Captain D's had a legitimate claim of entitlement to freely contract with Smith to have claims between them arbitrated without worry or danger that the state would infringe on that right without procedural due process being afforded. *Meyer v. State of Nebraska*, 262 U.S. 390, 399 43 S. Ct. 625, 67 L. Ed. 1042 (1923) (recognizing the right of the individual to contract as a liberty guaranteed by the Fourteenth Amendment to the Constitution); U.S. Const. Amend. XIV, § 1. The Due Process Clause of the Fourteenth Amendment thus required that any deprivation of Captain D's rights to contract for arbitration with Smith be preceded by adequate notice and an opportunity to be heard on same so that it could fully enjoy such rights. See *Goss v. Lopez*, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 725 (1975). The Mississippi Supreme Court acted in derogation to the guarantees of due process by taking away Captain D's contract rights based on "an issue never raised or briefed by [Smith] and not discussed by the trial court." (Dickinson, J., dissenting) App., *infra* 14a. Heretofore, the Mississippi Supreme Court had assured litigants that it would not consider "questions of whatever nature" which had not been timely raised at the trial court level. *See* cases on the procedural bar, *supra*. Without any notice to Captain D's and after the parties had fully litigated the narrow issues joined in the case, the Mississippi Supreme Court changed the rules mid-game and took away Captain D's contract rights without advance notice that the scope of the arbitration agreement would be called into question such that Captain D's could come in and duly defend.

As this Court wrote in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950), the right to be heard ensured by the guarantee of due process "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Id.* at 314; *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812, 105 S. Ct. 2965, 2974-2975, 86 L. Ed. 2d 628 (1985); *Schroeder v. City of New York*, 371 U.S. 208, 212-213, 83 S. Ct. 279, 282-283, 9 L. Ed. 2d 255 (1962).

That Captain D's—after the fact of the ruling—filed a motion seeking reconsideration of the Mississippi Supreme Court's decision and challenged the basis thereof did not cure the deprivation of due process which had already occurred. Had due process been afforded as the Constitution requires, Smith would have had the burden of proving she did not agree to arbitrate the claims at issue (see *Gilmer, supra*, 500 U.S. at 26) and Captain D's would have had fair opportunity to meet, defend and rebut the challenge. See *Armstrong v. Manzo,* 380 U.S. 545, 550-551, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965) (holding that "whatever constitutional infirmity resulted from the failure to give the petitioner notice [was not] cured by the hearing subsequently afforded to him upon his motion to set aside the decree."). Merely having the chance to convince the majority to re-examine their already fixed view of the case on rehearing is not due process. The right of a party to protect its freedom to contract under § 2 of the FAA is wholly devalued unless fair notice is given ahead of time that the right is imperilled. The Mississippi Supreme Court's decision flies in the face of this paramount guarantee.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for writ of *certiorari*.

Respectfully submitted,

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